EARL HUMMEL

IBLA 79-237 Decided November 27, 1979

Appeal from decision of the Montana State Office, Bureau of Land Management, rejecting color-of-title application M 41224 (SD).

Affirmed.

1. Color or Claim of Title: Adverse Possession: Color or Claim of Title: Good Faith

   A person who applies for title to public lands under the homestead laws effectively admits that he believes title to the lands is held by the United States, and this admission negates any possibility of good faith possession under color-of-title.

APPEARANCES: Martin Weeks, Esq., Bogue, Weeks, and Rusch, Vermillion, South Dakota, for appellant, Wayne D. Groe; Stickney and Groe, Elk Point, South Dakota, Harold C. Rosenbaum, for intervenor.

OPINION BY ADMINISTRATIVE JUDGE FISHMAN

Earl Hummel has appealed a decision dated January 23, 1979, rendered by the Montana State Office, Bureau of Land Management (BLM), rejecting his color of title application M 41224 (SD).

Appellant filed his class I color-of-title application on July 11, 1978, for 127 acres in Union County, South Dakota. The land is described as NW 1/4 SW 1/4, and lot 3 of the SW 1/4 sec. 33, T. 90 N., R. 49 W.

Appellant alleged as the basis for his claim that he had been in open, notorious, and adverse possession for more than 20 years and had paid all the taxes assessed on the land. A document in the file entitled "Conveyances Affecting Color or Claim of Title" indicates that appellant obtained the lands from Sylvia Rosenbaum in 1956. In a letter dated May 31, 1968, appellant's attorney advised the BLM District Manager that appellant bought the lands in 1954 and completed payment thereon in 1964 at which time he received a deed. The file contains a nearly illegible quitclaim deed from Sylvia Rosenbaum to Earl Hummel, which bears an ink notation, presumably of the Register of Deeds, reciting, "[T]his is the only instrument filed in our office on this tract of land (filed in 1964)."

On June 8, 1959, appellant had filed a homestead entry application for the above lands. The Montana land office rejected his application (among others) by decision dated January 18, 1960. That decision stated as follows:

> The above applications appear to have been made in accordance with the original plat of survey, which was made in 1861. According to this survey the lands were public domain on the bank of the Missouri river. However, information available to this office discloses that since 1861 the course of the river moved in an easterly direction over and across all of the lands described herein so that they were washed away completely; and that later the river moved in a westerly direction and new lands were formed by gradual accretion in the same general location as Lots 1, 2, 3 sec. 32, Lots 2, 3, N 1/2 SW 1/4 sec. 33 as shown on the plat of 1861.
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> Since the lands in question, as shown by the plat of 1861, were washed away by the Missouri River and the present lands were formed subsequently by accretion, the United States has no claim to the present lands. The present lands are subject to the riparian rights of the owners of the uplands to which they are riparian.
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> Each of the applications identified herein is rejected in its entirety because the United States has no claim or jurisdiction over the lands involved.

By letter dated July 23, 1971, appellant was advised that the January 18, 1960, decision was inoperative and that title to lands eroded away in their entirety and were later restored by accretion to the original owners.

The decision appealed from rejected the appellant's color-of-title application as follows:

> The requirements for holding in good faith, in peaceful, adverse possession under claim or color of title for 20 years has not been met. These same lands were involved in Mr. Earl H. E. Hummel's Homestead Entry application. Montana 034018 (SD), filed June 15, 1959: * * * If we had requested and Mr. Hummel had furnished a document for the 1956 conveyance mentioned in the application, he could only show a claim for 4 years and this is not sufficient under the Act. [1/]

1/ Color of Title Act of December 22, 1928 (45 Stat. 1069), as amended, 43 U.S.C. § 1068a-1068b (1976).

In his statement of reasons appellant notes, apparently referring to the homestead application, that in 1959 he "applied for the patent and tendered his money." Appellant contends that the January 18, 1960, decision (quoted in part, supra) "reconfirmed and reinforced [his] belief that he was in fact the fee title holder of the land." Appellant asserts that he has put nine buildings on the land (including a house and outbuildings), that he has cleared a portion of land for cultivation, and that he used all of the land for pasture since he acquired it. Appellant further asserts that ever since the land was redeposited by action of the river, he or his predecessors have been in adverse possession of the land and have paid taxes thereon. However, in a letter dated May 12, 1979, counsel for appellant admitted to the Board that appellant did not pay taxes on lot 3 of the claimed lands, that taxes on that lot were, in fact, paid by one Ralph Rosenbaum, after counsel for Rosenbaum had asserted nonpayment of taxes on lot 3 by appellant.

Appellant requests a hearing pursuant to 43 CFR 4.415 to present further evidence.

[1] With respect to all the lands included in the color-of-title application, appellant filed homestead application, Montana 034018 (SD), on June 15, 1959. It is clear that he either recognized that title was in the United States, or minimally that there was a substantial question as to his title. That he acquired the land by a quitclaim deed in 1956 and did not record the deed until 1964 raises further questions as to his bona fides. Moreover, the absence of any prior recorded instrument affecting the lands in issue casts grave doubt on the purported bona fides of appellant.

The Secretary has promulgated regulations governing the administration of the Color of Title Act which provides in part (43 CFR 2540.0-5) as follows:

> A claim is not held in good faith where held with knowledge that the land is owned by the United States. A claim is not held in peaceful, adverse possession where it was initiated while the land was withdrawn or reserved for Federal purposes.

The U.S. Department of the Interior has consistently construed the Color of Title Act in conformity with the above regulations: i.e., an applicant who applies for title to public lands pursuant to public land laws such as the Homestead Act, the mineral laws or the Trade and Manufacturing Site Location Act, effectively admits that he believes title to the lands is held by the United States, and this admission negates any possibility of good faith possession under claim or color of title. Nora Beatrice Kelley Howerton, 71 I.D. 429 (1964) (applicant's father's prior color-of-title application failed); Purvis C. Vickers, 67 I.D. 110 (1960) (applicant's

father acquired mining claim on land and applicant filed homestead application which was rejected because land had been withdrawn from appropriation); Bernard J. and Myrtle A. Gaffney, A-30327 (October 28, 1965); Thomas Ormachea, A-30092 (May 8, 1964) (mere possession without basis for good faith claim is insufficient under Color of Title Act; legislative history of original Act and 1953 amendment reveal basic purpose to help persons holding land in good faith under some chain of title later found defective); Walter G. Kreuter, A-29065 (October 22, 1962) (applicant's predecessor's homestead application, which was denied for failure to satisfy requirement of survey, held a bar to good faith claim of title); Anthony S. Enos, 60 I.D. 106 (1948) (applicant knew United States owned land at the time he purchased defective title).

The Secretary has consistently held since 1937 that not only is knowledge of title in the United States a bar to good faith possession under color or claim of title but that an applicant must show a legally justifiable reason for believing that he owned the land or that his possession would give rise to acquisition of title. Myrtle A. Freer, 70 I.D. 145 (1963); Bernard J. and Myrtle A. Gaffney, supra; Hugh Manning, A-28383 (August 18, 1960); Henshaw v. Ellmaker, 56 I.D. 241 (1937).

The possession of a grantor under which the color of title applicant claims may be tacked onto the claimant's period of holding under color of title only if that grantor held in good faith as required by the Color of Title Act. Phyllis deYoung Tucker, A-26984 (November 26, 1954). One who occupies land knowing that it is owned by the United States does not hold the land in good faith under claim of title. Phyllis deYoung Tucker, supra; Anthony S. Enos, supra. One who had possession of public land without any substantial basis in reason for the belief that he has good title against the United States does not hold in good faith as required by the Act. Christopher A. Merlau, A-26204 (December 18, 1951). It necessarily follows that appellant cannot tack his claim to that of the prior holder because he has not shown that his predecessor, Sylvia Rosenbaum, held the land under color or claim of title and had any substantial basis in reason for the belief that she had good title.

To conclude, appellant has not made a prima facie showing of entitlement under the Color of Title Act. Appellant has not shown an adequate chain of title wherein the land was held for 20 years in good faith under a claim or color of title.

Appellant's request for a hearing is denied since appellant has alleged no facts which, even if proved true, would change the legal conclusions reached in the case. Frank G. Wells, 28 IBLA 113 (1976).

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Frederick Fishman
Administrative Judge

I concur:

Joan B. Thompson
Administrative Judge

ADMINISTRATIVE JUDGE STUEBING CONCURRING IN THE RESULT:

The BLM decision of January 18, 1960, recited in the main opinion, held that the public land surveyed in 1861 had "washed away completely," and that subsequently "the river moved in a westerly direction and new lands were formed in the same general location." On this basis, the 1960 BLM decision concluded that "the United States has no claim to the present lands."

Appellant alleges that in reliance on this official declaration by the responsible Federal agency, and on the strength of his quit-claim deed from the ostensible owner, he built nine buildings, including a dwelling, cleared land, put some of it into cultivation and some into pasture, erected fences, paid taxes, 1/ and otherwise invested in the property. He argues, inter alia, that the Government is estopped to change its position 11 years later and assert Federal ownership, citing United States v. Wharton, 514 F.2d 587 (9th Cir. 1975).

I will not comment on appellant's estoppel argument except to note that it is inconsistent with appellant's prayer that his color-of-title application be granted so that he may purchase the land from the United States.

However, in 1971 BLM did change its position, and by its letter dated July 23 of that year, declared that BLM "does not hold to the decision of January 18, 1960," and that notwithstanding the 1960 decision, the Bureau was asserting Federal title to the land. But the 1971 letter recited essentially the same facts as did the 1960 decision, i.e., that the "lands eroded away in their entirety and [were] later restored by accretion." Such land, says the 1971 letter, "is restored to the original riparian owners." (Emphasis added.)

On the basis of my past research in similar cases, I assumed at first sight that BLM's present contention is incorrect beyond peradventure of doubt, and that the United States has no claim to the new land which accreted to the remote land which is privately owned. It seemed to me that once the original riverfront land was eroded away "entirely" and "completely," so that the adjacent land behind it became the shoreline, title to the accretion to the remote tract would vest in the owner of the land to which it attached, even if the newly accreted land eventually replaced the original tract which had been completely eroded away. That was the law of the case in Margaret C. More, 5 IBLA 252 (1972), wherein a tract of patented land in Kansas was eroded away by the Republican River and replaced, eventually, by land which accreted to Federally-owned land withdrawn for the Fort

1/ It is now acknowledged that taxes on a portion of the land were paid by another.

Riley military reservation. In that case we held that the private owner had been divested through the loss of her land by erosion, and that the accreted land which replaced it belonged to the United States. See Solicitor's Opinion, M-36867 (Dec. 21, 1972). See also 4 Tiffany, Real Property (3rd ed. 1975), which states:

> § 1224. Land appearing in place of land disappearing.
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> When water so far encroaches on land that a tract which was formerly riparian is completely submerged or washed away and land formerly nonriparian becomes riparian, subsequent accretions belong to the owner of the tract newly made riparian even though such accretions in time extend into or over the area formerly owned by an adjoining, and the original riparian owner, according to the view of many of the courts which have considered the matter. It has, however, occasionally been said that if part of one's land disappears by erosion or submergence, and subsequently land forms or reappears in the same place, the latter land belongs to the person who owned the land which disappeared. Such a statement, however, does not appear to accord with the authorities to the effect that, by the gradual encroachment of water on one's land, one loses the part encroached on, and it would seem to be true only when the encroachment is sudden and perceptible, or there appears an intention that the boundary shall remain in the same location in spite of a gradual change in the location of the water, or for some other reason the locality covered by the land which disappeared remains in the same ownership after the disappearance as before. [Footnotes omitted; emphasis added.]

Note that in the foregoing discussion the minority rule, which is obviously not favored by the author, is said to operate only where part of one's land disappears by erosion. But, the Supreme Court of the State of South Dakota has transcended even that rule and embraced the following doctrine:

> Where a river gradually washed away lots in section 31 belonging to plaintiff, until they became submerged, and encroached on the southwest quarter of section 30 upon some owned by the defendant, so that he became the riparian owner, and thereafter the land submerged was by gradual deposit restored, the lots in section 31 did not become the property of defendant on the theory that the old boundary line was extinguished.

Allard v. Curran, 168 N.W. 761 (Sup. Ct. S.D. 1918).

Fortunately for appellant, the determination of Federal title in such cases is not controlled by the law of the State where the land is

situated, but by Federal law. Cf. State Land Board v. Corvallis Sand and Gravel Co., 429 U.S. 363 (1977). Unfortunately for appellant, this Department has, on at least one occasion, followed the South Dakota rule laid down in Allard v. Curran, supra. In that case, Towel v. Kelly and Blankenship, 54 I.D. 455 (1934), the Department held:

> Where surveyed public lands of the United States bordering upon a navigable stream, and to which the United States has not parted with title, are eroded in their entirety by the action of the stream, and later restored by accretion, title to the lands so restored is in the United States, and not in the owners of the remote nonriparian lands, which lands for a time were the shore lands.

However, that Departmental case appears to be something of an aberration, in that it disregards legal factors which ordinarily are of critical moment in the resolution of such cases. For example, Towel states, at 457:

> On the basis of the legal view hereafter developed, it is immaterial to determine if these lots were ever wholly washed away, and if so, whether by imperceptible erosion or avulsion and it further being immaterial that the back lots might have been riparian at a date subsequent to their original disposal. The view taken of the law in this case is based on this factual situation, namely, that lots 1, 2, 3 and 4 were extant in 1867, the date of the admission of Nebraska to statehood, and that none of the back lots, when disposed of, was riparian, and that said back lots were conveyed originally with reference to surveyed lines. [Emphasis added.]

I simply cannot agree that the date of survey relative to the date of admission to statehood, or whether the back lots were then riparian, is even relevant, much less controlling. And certainly it is material whether the lots were wholly washed away, and whether the change was gradual or avulsive.

The English view is that land formed by gradual and imperceptible accretion due to natural causes belongs to the owner of the land adjoining the foreshore, even though the former boundary of such land prior to the accretion is well known and is readily ascertainable. Brighton & Hove General Gas Co. v. Hove Bungalows, 13 B.R.C. 2/

2/ British Ruling Cases.

183 (1924). The United States Supreme Court has followed the English doctrine (established in cases prior to Brighton & Hove, supra), saying:

> This rule is applicable to government lands bounded by the Missouri River, as the same are surveyed and platted under the acts of Congress; and the patent passed the title of the United States to lot 4, not only as it was at the time of survey in 1851, but as it was at the date of patent in 1855, so that the United States did not retain any interest in any accretion formed between the survey in 1851 and the date of patent. [Emphasis added.]

Jeffries v. East Omaha Land Co., 134 U.S. 178, 195 (1890).

Moreover, the Court alluded to one of its earlier decisions concerning land on the Mississippi, and explained:

> The rule is as applicable to the Missouri River as it is to the Mississippi, whether the principle on which it rests be that the riparian owner is entitled to the addition to his land because he must bear without compensation the loss of land caused by the action of the water and any consequent expense of repair to the shore, or whether that principle be one of public policy, in that it is in the interest of the community that all lands should have an owner, and most convenient that unsensible additions to the shore should follow the title to the shore.

Id. at 191.

It has been suggested to me that BLM is relying on "the doctrine of re-emergence" in the assertion of Federal title to the subject land. Perhaps, but if so, its reliance is misplaced entirely. I have noticed that occasionally the courts have confused the doctrine of reemergence with the other rules of law pertaining to erosion, accretion, avulsion and reliction. The doctrine or reemergence operates, in some jurisdictions, where land riparian to a body of water is gradually submerged (not eroded away) by the expanding volume of the water body as, for example, where a gradual alteration in climatic conditions produces an increase in the mean annual rainfall over a long term of time. Subsequently, if through a reversal of this climatic trend, or a lowering of the water table, or otherwise, the water recedes and exposes the same land, the land is said to have "re-emerged," and, if it can be readily identified and described, the courts in certain jurisdictions will hold that it remains the property of the holder of the title at the time it was submerged, rather than treating it as relicted land accruing to the owner of the shoreline at

the time of high water. 3/ However, where the land which was riparian when surveyed is gradually eroded away until it is taken "entirely" and "completely," it is gone, and with it is gone the former owner's basis of title and claim to riparian rights. The underlying land which once served as the foundation for the high, fast, dry land which has been taken no longer belongs to its former owner, as it now lies at the bed of the river or lake which, if navigable, is the property of the State. The State's title to the bed of a navigable river mechanically follows the river's gradual changes in course. Bonelli Cattle Co. v. Arizona, 414 U.S. 313 (1974) 4/; Oklahoma v. Texas, 268 U.S. 252 (1925). Thus, in the instant case the title of the United States was totally vitiated in law and in fact, and nothing remained to serve as the basis of a Federal claim to the title to the new land which subsequently formed in its place over the course of many years.

Where the tract originally surveyed as riparian is entirely eroded away and the river reaches and encroaches upon the land behind it, so that the formerly landlocked tract becomes the shoreline, it cannot be asserted that the once remote tract remains nonriparian, as was stated in Towel v. Kelly and Blankenship, supra. Suppose the river then remains unaltered in that position for 100 years. If the title of the State to the riverbed changes "mechanically" with the gradual change of the river's course, so must the riparian rights of the upland owners. The right to accretion is just one of the bundle of riparian rights. Can it reasonably be said that the owner of the newly created shoreline tract may enjoy the other riparian rights and must bear the risk of loss by the further erosion of his own property, but is denied the benefit of any accretion? I think not.

3/ In Beaver v. United States, 350 F.2d 4 (9th Cir. 1965), the court adopted the Government's explanation of the doctrine of reemergence, as follows:

"That doctrine rests upon `easy identification' of riparian land 'lost' and `found' again by re-emergence from the stream bed. These elements are not here present. We agree with the government: `That doctrine has been applied by some state courts as an exception to the doctrine of accretion, but not in a factual situation such as is present in this case. In order for the doctrine to be applied in those states that recognize it, two things must occur: First, the watercourse must move across and submerge riparian land so that land formerly non-riparian is made riparian; then the watercourse must return to or near its original bed so that the riparian land that had been submerged is uncovered, or re-emerges."

4/ Bonelli Cattle Co. v. Arizona was overruled on different grounds by State Land Board v. Corvallis Sand and Gravel Co., supra, but contains an excellent and still valid discussion of the migration of a State's title to the bed of a navigable river as the river course is altered.

For the sake of brevity I have deliberately avoided references to a great many precedents which deal with this subject, including numerous decisions by the United States Supreme Court and the several Federal courts of appeal. I now recognize that there is disagreement among some authorities on this issue. See 78 Am. Jur. 2d, Waters § 421 (1975). However, I am fully persuaded that the controlling body of Federal common law would compel a finding that BLM is in error, and that the United States has no claim or title to the land which is the subject of Hummel's color-of-title application. Therefore, I agree that the application must be rejected, albeit for reasons distinctly different from those of my fellow panel members.

This opinion does not represent an effort on my part to adjudicate the title, but rather is intended as an analysis of my doubts regarding the correctness of BLM's position on the basic issue. The title question can be litigated by the appellant, if necessary, pursuant to P.L. 92-562; 86 Stat. 1176 (1972); 28 U.S.C. § 2409a (1976).

Edward W. Stuebing
Administrative Judge